No. 10,939

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,	
	Appellant,
vs.	
UNITED STATES OF AMERICA,	
	Appellee.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

The United States has filed herein a brief purporting to answer the points raised by appellant. In doing so the United States has substituted its own question for the first question raised by appellant.

The first question raised by appellant was that "The double jeopardy clause of the Fifth Amendment to the Constitution was violated by the verdicts finding appellant guilty on Counts 1 and 2 of the indictment and by the court ordering the sentences pronounced on each of said counts to run consecutively."[1]

The United States substitutes for this question one of its own, worded as follows: "Counts One and Two

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[1]Appellant's Opening Brief, p. 22.

of the indictment state separate and distinct offenses punishable as such."[2]

We concede that, under proper circumstances, the concealment and facilitating the concealment of opium may be a separate and distinct offense from the facilitating the transportation of opium, and such offenses may be charged in two counts of an indictment and punished separately.

Appellant's contention is that the evidence established but one continuous unbroken transaction and that the acts alleged as constituting the first count of the indictment were proven to be but incidental to the offense alleged in the second count. The question presented is primarily one of evidence and not of pleading.

Having called this matter to this Court's attention we will discuss the authorities cited by the United States in the order in which they appear in the Government's brief.

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1. THE ORDER DIRECTING THE SENTENCES TO RUN CONSECUTIVELY CONSTITUTES DOUBLE PUNISHMENT AND DOUBLE JEOPARDY FOR THE SAME OFFENSE.

First the Government cites the case of *Gargano v. United States* (CCA-9), 140 F. (2d) 118, as holding that *an indictment,* charging in count one the concealing and facilitating the concealment of narcotics and in count two the facilitating the transportation of narcotics, states two separate and distinct offenses

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[2]Brief for Appellee, p. 24.

punishable as such.[3] It should be noted that the Government has transposed the two counts of the Gargano indictment as appears from the decision of this Court (p. 19) as follows:

> "Count 1 charged that appellant, on or about July 7, 1937, * * * facilitated the transportation of a certain lot of morphine * * *. Count 2 charged that appellant, on or about July 8, 1937 * * * concealed and facilitated the concealment of the same lot of morphine. Obviously these counts charged distinct offenses."

Clearly, transportation *followed* by concealment presents a far different situation from concealment *incidental* to transportation. In the first instance the offense of transportation has been completed before the concealment begins; in the second instance, the concealment and transportation are part of the same transaction.

The case of *Parmagini v. United States* (CCA-9), 42 F. (2d) 721, does not support the Government's position. In fact, we cited this case as an authority in support of appellant's position.[4] In the *Parmagini* case several offenses were charged. This Court held as follows: (a) The concealment and sale of opium were separate offenses; (b) selling morphine and distributing morphine at the same time were but one offense; (c) concealment of morphine and opium were but one offense. This Court pointed out that where one act is an incident to an ultimate act, but one offense has been committed.

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[3]Brief for Appellee, pp. 24-25.
[4]Appellant's Opening Brief, p. 32.

In *Palmero v. United States* (CCA-1), 112 F. (2d) 922, there was neither raised nor involved the question of double punishment. The sole question was whether an importing of opium could occur before the opium was unloaded from the ship. The Court held that both the importing and bringing in of opium was complete when the ship entered the territorial waters of the United States.

The case of *Silverman v. United States,* 59 F. (2d) 636, involved a situation where the indictment charged sale and distribution under the Harrison Narcotic Act and concealment under the Jones-Miller Act. The Court held the charges to be distinct offenses. There is nothing in the opinion to show the time elements involved. The concealment may have long antedated the sale. If this case be construed in the manner contended for by the United States, then it is directly opposed to the cases cited on pages 29 to 36 of appellant's opening brief. The same criticism applies to the case of *Walsh v. White* (CCA-8), 32 F. (2d) 240.

In *Yep v. United States* (CCA-10), 81 F. (2d) 637, defendant was acquitted on a count charging purchase and convicted on a count charging sale. The Court properly held that the acquittal was no bar to the conviction.

The Government has failed to comment on or distinguish any of the cases cited by appellant and the cases relied on by the Government do not support its position.

Maugeri's act was but one act, the concealment was but incidental to the transportation. The trial Court's

direction that the sentences run consecutively constituted double punishment and violated the Fifth Amendment.

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2. INSUFFICIENCY OF THE EVIDENCE TO SUPPORT COUNT 2 OF THE INDICTMENT.

In an attempt to meet our argument under this heading, the Government argues as follows:

> "When appellant delivered the two cartons of opium to the defendants Tocco and Barri in Agent Pocoroba's cabin he had committed the offense of concealing and facilitating the concealment of opium. When in addition to this, on the following morning, he drove the defendant Tocco in his automobile, presumably to board the train taking him to Chicago, he committed the separate offense of facilitating the transportation of opium. It is to be remembered also that appellant admitted to Pocoroba that he drove Tocco to Berkeley and that his car was seen entering his home at 9:00 A. M. Sunday morning."[5]

The foregoing statement is erroneous in its facts, conclusions and the law.

From the manner in which the foregoing statement is worded one would gather the impression that there was ample testimony to establish (a) that appellant drove Tocco in his automobile and (b) that *in addition thereto* appellant admitted that he drove Tocco to Berkeley. Such is not the fact. The only evidence on this point is Pocoroba's testimony that on August

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[5]Brief for Appellee, p. 27.

16th he returned to Santa Cruz and had a conversation with Maugeri as follows:

> "Mr. Hennessy. Q. What conversation did you have, if any, with Maugeri?
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> A. I asked if he heard from the boys, and he said 'No', and he said, 'If I don't hear from them again I would be glad. They are certainly lousy. Joe Tocco was introduced to me by a friend of mine, and the others were lousy.' *And I asked him where he took Joe Tocco and he said to Berkeley.*"[6]

The foregoing is the only testimony in the record showing that Maugeri had anything to do with the matter after he left Pocoroba's cabin at about 11:00 P. M. on August 12th or when he knocked on the cabin door (if he did knock) at 3:30 A. M. on August 13th.

There is nothing in the record to show that the conversation between Pocoroba and Maugeri on August 16th referred to the morning of August 13th. So far as the record is concerned Maugeri may have been referring to a date much earlier than August 12th or 13th when he said he drove Tocco to Berkeley. The record does show that he drove to San Francisco—probably elsewhere—on several occasions prior to August 12th.

Whether Maugeri did or did not make such statement to Pocoroba is immaterial for the reason that *extrajudicial statements, admissions or even confes-*

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[6]T.R. 41-42.

sions of a defendant are incompetent to prove the corpus delicti of the offense with which he is charged.

The *corpus delicti* of the offense charged in the second count of the indictment is not the *transporting* of opium, but is the *facilitating* of the transportation of opium.[7] There is no evidence in the record, other than the claimed admission made by Maugeri, that even tends to establish that anything was done to *facilitate* any transportation.

It is fundamental that the *corpus delicti* must be established by evidence other than the extrajudicial statements, admissions or confessions of a defendant.

> *Ryan v. United States,* 99 Fed. (2d) 864;
> *Goff v. United States,* 257 Fed. 294.

It is equally well settled that an extrajudicial statement or confession cannot be considered in determining the sufficiency of the evidence to support a conviction *unless the corpus delicti is established by evidence independent of the extrajudicial admission or confession.*

> *Wynkoop v. United States,* 22 Fed. (2d) 799;
> *Mangum v. United States,* 289 Fed. 213;
> *Daeche v. United States,* 250 Fed. 566;
> *Flower v. United States,* 116 Fed. 241.

Eliminating the admission of Maugeri, as testified to by Pocoroba, there is absolutely no evidence in the record to show that anyone, let alone Maugeri, *facilitated* the transportation of the opium in question.

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[7]The transportation of opium is a violation of the Harrison Narcotic Act and is not a violation of the Jones-Miller Act. Appellant herein was not charged with transporting opium or aiding and abetting another to transport opium.

Thus, the evidence, for the foregoing reasons and those urged in appellant's opening brief, is wholly insufficient to support the second count of the indictment.

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3. THIS COURT CAN AND SHOULD CONSIDER THE INSUFFICIENCY OF THE EVIDENCE.

The Government urges that because a motion for directed verdict was not made by appellant, at the close of all the evidence in the case, the Court will not look into the sufficiency of the evidence.

Several cases are cited in support of this contention and we cannot dispute that such is the general rule. This rule, however, is not a hard and fast one and there are well defined exceptions to it.

An Appellate Court has the power to notice and act upon any error appearing in the record and should do so if it affects the substantial rights of the parties.

In the instant case the insufficiency of the evidence to support the second count of the indictment is so clear that it would be a grave miscarriage of justice to allow this conviction to stand, especially when the penalty imposed thereon is ten years imprisonment which does not begin to run until the expiration of the ten year sentence imposed upon the first count. Under such circumstances the Courts have time and time again considered the question even though no motion for a directed verdict had been made in the trial Court.

In the case of *Edwards v. United States* (CCA-8), 7 Fed. (2d) 357, 359, the Court reviewed the sufficiency of the evidence, under circumstances identical with

those of the case at bar, and set forth the law in that regard supported by ample authorities as follows:

> "*There exists in this court, however, especially in cases where life and liberty are involved, an inherent power to consider the sufficiency of the evidence to sustain a verdict of guilty, even where the question is not properly presented to the trial court, if this court is satisfied there has been a miscarriage of justice.* If the evidence is convincing that defendants are guilty, then there is no reason ordinarily for the court to exercise such power. This court has in a number of instances, where life and liberty of an individual were at stake, considered the sufficiency of the evidence to warrant conviction of the crime charged, although the question was not properly raised in the trial court; Gillette v. United States, 236 F. 215, 149 C.C.A. 405, being a case in point.
>
> "In Sykes v. United States, 204 F. 909, 913-914, 123 C.C.A. 205, 209 (citing many cases), this court said: 'To escape from the effect of this conclusion, counsel challenge our attention to the fact that no request for a peremptory instruction to return a verdict for Sykes was made at the trial, and invoke the conceded rule that the court may not review the existence of evidence to sustain a verdict, in the absence of a request after the close of the evidence for a peremptory instruction. Rimmerman v. United States, 186 F. 307, 311, 108 C.C.A. 385. *But there is an exception to this general rule, which has been made to prevent just such gross injustice as would result from the punishment of the defendant Sykes upon the evidence which has been recited. It is that in criminal cases, where the life, or, as in this case, the liberty, of the defendant is at stake, the courts of the*

United States, in the exercise of a sound discretion, may notice such a grave error as his conviction without evidence to support it, although the question it presents was not properly raised in the trial court by request, objection, exception, or assignment of error.'

"In Robins v. United Startes (C.C.A.), 262 F. 126, 127, the court took the ground that, where the sufficiency of the evidence was not questioned in the trial court, it could not be urged here, 'unless in our discretion we decide so to do.' See also Humes v. United States, 182 F. 485, 105 C.C.A. 158; Savage v. United States, 213 F. 31, 130 C.C.A. 1; Feinberg v. United States (C.C.A.), 2 F. (2d) 955. In other jurisdictions, see Lockhart v. United States (C.C.A.), 264 F. 14; Quarles v. United States (C.C.A.), 274 F. 203; De Jianne v. United States (C.C.A.), 282 F. 737; Thompson v. United States (C.C.A.), 283 F. 895; Bilboa et al. v. United States (C.C.A.), 287 F. 125; Robilio et al. v. United States (C.C.A.), 291 F. 975; Horning v. District of Columbia, 254 U.S. 135, 41 S. Ct. 53, 65 L. Ed. 185." (Italics added.)

We respectfully submit that in the case at bar this Court should exercise its power and discretion and review the evidence to avoid a plain miscarriage of justice.

Dated, San Francisco,
July 23, 1945.

Respectfully submitted,

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